

**§ 219.602 FRA Administrator's determination of random drug testing rate.**

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing must be 50 percent of covered employees.

(b) The FRA Administrator's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from railroads, and may make appropriate modifications in calculating the industry positive rate. Each year, the Administrator will publish in the FEDERAL REGISTER the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(c) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 219.803 for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(d) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of § 219.803 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

(e) Selection of covered employees for testing must be made by a method employing objective, neutral criteria which ensures that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may

not permit subjective factors to play a role in selection, i.e., no employee may be selected as a result of the exercise of discretion by the railroad. The selection method must be capable of verification with respect to the randomness of the selection process.

(f) The railroad must randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Administrator. If the railroad conducts random drug testing through a consortium, the number of employees to be tested may be calculated for each individual railroad or may be based on the total number of covered employees covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT agency drug testing rule.

(g) Each railroad must ensure that random drug tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(h) If a given covered employee is subject to random drug testing under the drug testing rules of more than one DOT agency for the same railroad, the employee must be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

(i) If a railroad is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the railroad may—

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the railroad is subject.

**§ 219.603 Participation in drug testing.**

A railroad shall, under the conditions specified in this subpart and subpart H of this part, require a covered employee selected through the random

## § 219.605

testing program to cooperate in urine testing to determine compliance with § 219.102, and the employee must provide the required specimen and complete the required paperwork and certifications. Compliance by the employee may be excused only in the case of a documented medical or family emergency.

### § 219.605 Positive drug test results; procedures.

(a) [Reserved]

(b) Procedures for administrative handling by the railroad in the event a specimen provided under this subpart is reported as positive by the MRO are set forth in § 219.104. The responsive action required in § 219.104 is not stayed pending the result of a retest or split specimen test.

### § 219.607 Railroad random alcohol testing programs.

(a) Each railroad must submit for FRA approval a random alcohol testing program meeting the requirements of this subpart. A railroad commencing operations must submit a random alcohol testing program not later than 30 days prior to such commencement. The program must be submitted to the Associate Administrator for Safety, FRA, for review and approval. If, after approval, a railroad desires to amend the random alcohol testing program implemented under this subpart, the railroad must file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A program responsive to the requirements of this section or any amendment to the program may not be implemented prior to approval.

(b) *Form of programs.* Random alcohol testing programs submitted by or on behalf of each railroad under this subpart must meet the following criteria, and the railroad and its managers, supervisors, officials and other employees and agents must conform to such criteria in implementing the program:

(1) Selection of covered employees for testing must be made by a method employing objective, neutral criteria which ensures that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may

## 49 CFR Ch. II (10–1–02 Edition)

not permit subjective factors to play a role in selection, i.e., no employee may be selected as the result of the exercise of discretion by the railroad. The selection method must be capable of verification with respect to the randomness of the selection process, and any records necessary to document random selection must be retained for not less than 24 months from the date upon which the particular specimens were collected.

(2) The program must include testing procedures and safeguards, and, consistent with this part, procedures for action based on tests where the employee is found to have violated § 219.101.

(3) The program must ensure that random alcohol tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(4) The program must ensure to the maximum extent practicable that each covered employee perceives the possibility that a random alcohol test may be required at any time the employee reports for work and at any time during the duty tour (except any period when the employee is expressly relieved of any responsibility for performance of covered service).

(5) An employee may be subject to testing only while on duty. Only employees who perform covered service for the railroad may be subject to testing under this part. In the case of employees who during some duty tours perform covered service and during others do not, the railroad program may specify the extent to which, and the circumstances under which they are subject to testing. To the extent practical within the limitations of this part and in the context of the railroad's operations, the railroad program must provide that employees are subject to the possibility of random testing on any day they actually perform covered service.

(6) Testing must be conducted promptly, as provided in § 219.701(b)(1).

(7) Each time an employee is notified for random alcohol testing the employee must be informed that selection was made on a random basis.